UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MEXICAN GOVERNMENT BONDS ANTITRUST LITIGATION	:	Master Docket No. 18-cv-02830 (JPO)
This document relates to:	:	
ALL ACTIONS	:	

MOVING DEFENDANTS' JOINT MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

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Moving Defendants[1] respectfully submit this joint memorandum of law in opposition to Plaintiffs' motion under Federal Rule of Civil Procedure 54(b) for reconsideration of this Court's personal jurisdiction ruling in *In re Mexican Government Bonds Antitrust Litigation*, No. 18-cv-02830 (JPO), 2020 WL 7046837 (S.D.N.Y. Nov. 30, 2020) ("*MGB II*").

PRELIMINARY STATEMENT

The Supreme Court's recent holding in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), provides plaintiffs no relief. At bottom, this litigation is about a handful of Mexico-based individual traders allegedly conspiring, in Mexico, to rig auctions for and affect the price of Mexican Government Bonds. *Ford*'s rejection of a causation-only approach to specific jurisdiction "does not mean anything goes"; rather, *Ford* emphasized that the specific jurisdiction test "incorporates real limits." *Id.* at 1026. Concluding that defendants here—Mexico-based banks with no regular business contacts with New York customers—are subject to specific personal jurisdiction in this case would do away with those limits.

STANDARD FOR RECONSIDERATION

Reconsideration is an "extraordinary remedy" that should generally be denied "'unless cogent and compelling reasons militate otherwise.'" *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 27 F. Supp. 3d 447, 457, 473 (S.D.N.Y. 2014) (quoting *Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 1992)); *see also Geo-Grp. Commc'ns, Inc. v. Shah*, No. 15 CIV. 1756 (KPF), 2020 WL 5743516, at *9 (S.D.N.Y. Sept. 25, 2020) (applying this standard in Rule 54(b)

[1] Defendants who join this opposition are: Banco Santander (México), S.A., Institución de Banca Múltiple, Grupo Financiero Santander México, BBVA Bancomer S.A., Institución de Banca Múltiple, Grupo Financiero BBVA Bancomer, Banco Nacional de México, S.A., Institución de Banca Múltiple, Grupo Financiero Banamex, Deutsche Bank México, S.A., Institución de Banca Múltiple, HSBC México, S.A., Institución de Banca Múltiple, Grupo Financiero HSBC, and Bank of America México, S.A., Institución de Banca Múltiple, Grupo Financiero Bank of America. Subsequent references to "defendants" shall mean these Defendants, and citations are omitted.

context). An intervening change in controlling law justifies reconsideration only when the court has a "clear conviction of error with respect to a point of law on which its previous decision was predicated." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (explaining that "[i]t is not enough . . . that [plaintiffs] could now make a more persuasive argument" under more recent case law). Even then, a court must consider "whether the change [in controlling law] justifies a . . . revision of [the] previous decision." *See Green v. Beer*, No. 06 Civ. 4156 (KMW) (JCF), 2009 WL 3401256, at *2 (S.D.N.Y. Oct. 22, 2009); *see also In re Gorsoan Ltd.*, No. 17-cv-5912 (RJS), 2021 WL 240736, at *8 (S.D.N.Y. Jan. 25, 2021) (denying requested relief despite finding intervening change in controlling law). Put differently, a change in law justifies reconsideration of an order only when that law "compel[s] a contrary conclusion." *Leidig v. BuzzFeed, Inc.*, 258 F. Supp. 3d 397, 401 (S.D.N.Y. 2017).[2]

Moreover, this Court's dismissal order rested on binding Second Circuit precedent, and *Ford* provides no basis to depart from that authority. *See MGB II*, 2020 WL 7046837, at *3 (applying *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68 (2d Cir. 2018)). A district court may not disregard binding Second Circuit precedent because of an intervening Supreme Court decision "'unless [the] subsequent decision of the Supreme Court so undermines [the Second Circuit precedent] that it will almost inevitably be overruled by the Second Circuit.'"

[2] The untimeliness of plaintiffs' motion for reconsideration is an additional reason to deny the motion. *McGraw-Hill Glob. Educ. Holdings, LLC v. Mathrani*, 293 F. Supp. 3d 394, 397 (S.D.N.Y. 2018). Local Civil Rule 6.3 requires that any motion for reconsideration be filed "within fourteen (14) days after the entry of the Court's determination of the original motion." Local Civ. R. 6.3. Here, plaintiffs did not file their motion until nearly six months after the Court's determination of the original motion, and nearly two months after the Supreme Court handed down its decision in *Ford* on March 25, 2021. Although the Court may set a different time for filing a motion for reconsideration, plaintiffs have not asked the Court to do so, or even attempted to explain the reason for their undue delay. *See Quezada v. Brown*, 2011 WL 4975343, at *2 (E.D.N.Y. Oct. 19, 2011) (holding motion for reconsideration based on intervening Supreme Court decision untimely because it was filed more than six weeks after the decision was issued).

See, e.g., *United States v. Diaz*, 122 F. Supp. 3d 165, 179 (S.D.N.Y. 2015) (emphasis added) (citing cases), *aff'd*, 854 F.3d 197 (2d Cir. 2017). Indeed, when the Second Circuit "has spoken directly to the issue presented," a district court "is required to follow that decision," unless the Second Circuit "is all but certain" to overrule itself in light of the intervening Supreme Court decision. *Id.*; *see Monsanto v. United States*, 348 F.3d 345, 351 (2d Cir. 2003) (holding that district courts and the Second Circuit are "bound" by Second Circuit authority, even if it is in "tension" with subsequent Supreme Court precedent, "unless and until that case is reconsidered by our court sitting in banc (or its equivalent) or is rejected by a later Supreme Court decision").

ARGUMENT

I. *Ford* Reiterated That Plaintiffs Must Allege a "Substantial Connection" Between Their Claims and the Forum

Far from upending the core principles of specific jurisdiction, *Ford* "reiterated [the] requirement" that a "defendant's suit-related conduct must create a substantial connection with the forum state." *Knight v. Standard Chartered Bank*, No. 19 Civ. 11739 (PAE), 2021 WL 1226870, at *6 (S.D.N.Y. Mar. 31, 2021); *see also Garrett-alfred v. Facebook, Inc.*, No. 8:20-cv-0585-KKM-CPT, 2021 WL 1946699, at *3 n.3 (M.D. Fla. May 14, 2021) ("'Related to' in *Ford* meant a substantial connection between [defendants'] contacts with the State and the plaintiffs' claims"). Although the specific jurisdiction test "contemplates that some relationships will support jurisdiction without a causal showing[,] [t]hat does not mean that anything goes." *Ford*, 141 S. Ct. at 1026. Rather, the test "incorporates real limits, as it must to adequately protect defendants foreign to a forum." *Id.* Courts must still scrutinize whether a defendant's contacts with the forum state "are related enough to the plaintiffs' suit," *id.* at 1031, taking into account the "nature and extent of 'the defendant's relationship to the forum state,'" *id.* at 1024.

Applying this standard, the Supreme Court found that Ford's in-forum activities were "related enough" to products-liability claims involving allegedly defective vehicles because Ford had "systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States." *Id.* at 1028 (explaining that Ford "sold, and serviced [the] two [particular] car models in both States for many years" and used "every means imaginable" to advertise those models to Montanans and Minnesotans). At the outset, Ford conceded that it did "substantial business" in the forum states and had purposely availed itself of the privilege of conducting activities in each forum. *Id.* at 1026. The Court recognized that by "conducting so much business" in Montana and Minnesota, Ford enjoyed the benefits and protections of those states' laws, including "the enforcement of contracts, the defense of property, [and] the resulting formation of effective markets." *Id.* at 1029. Ford thus had "clear notice" that it could be held liable for defects in "the very" product that it "extensively promoted, sold, and serviced" in Montana and Minnesota. *Id.* at 1030, 1032.

The Supreme Court repeatedly cautioned against extrapolating broad rules from its analysis of the specific facts at issue. For example, the Court made it clear that it "d[id] not address" a case in which Ford "marketed the models in only a different State or region." *Id.* at 1028. Nor did it "consider internet transactions," which "raise doctrinal questions of their own" and involve distinctions that "virtually list themselves." *Id.* at 1028 n.4. The Court also acknowledged that the fact pattern before it had "no distinctively modern features." *Id.* at 1025 n.2. Given the range of questions and fact patterns left unresolved by the Court's opinion, Justice Gorsuch observed in his concurrence that "[w]here this leaves us is far from clear." *Id.* at 1034. He explained that "between the poles of 'continuous' and 'isolated' contacts lie a virtually infinite number of 'affiliations' waiting to be explored[,] [a]nd when it comes to that vast terrain,

[the Court] supplies no meaningful guidance about what kind or how much of an 'affiliation' will suffice." *Id.* at 1035.

The Second Circuit is therefore not "all but certain" (*see* supra at 2) to overrule its own holding that an alleged conspiracy among foreign defendants that involved alleged conduct that occurred entirely abroad, that was not caused by any in-forum conduct, and that was not expressly aimed at the forum generally does not give rise to specific jurisdiction over those foreign defendants. *See Charles Schwab Corp. v. Bank of America Corp.*, 883 F.3d 68, 83-84 (2d Cir. 2018)). In any event, this Court need not address the question of *Schwab*'s continuing viability because, for the reasons explained below, plaintiffs have not pled facts sufficient to confer specific personal jurisdiction over defendants under *Ford*.

II. Defendants Did Not Conduct Substantial Business in the Forum

The record before this Court differs starkly from the facts the Supreme Court addressed in *Ford*. Whereas Ford conceded that it did substantial business in the relevant states, here the opposite is the case. Defendants neither have any physical presence in New York nor engage in regular business activity with New York customers. (*See* Dkt. 178 at 4-5 (summarizing defendants' sworn declarations).) Plaintiffs' allegations themselves demonstrate defendants' lack of transactional contacts in the forum: the SAC does not adequately allege a single direct trade in an allegedly manipulated MGB across all defendants. (*See id.* at 13 n.19; *see also* Dkt. 206 at 4 n.5.) There is therefore no basis for plaintiffs' brazen contention that "Defendants' billions of dollars in [MGB] commerce in the United States dwarfs the level of commerce that the [Supreme] Court found sufficient to establish that Ford [was subject to specific

jurisdiction]."[3] (*See* Dkt. 229 at 5.) On the contrary, the dearth of in-forum business activity alleged in the SAC—and corroborated by sworn declarations—illustrates precisely why, unlike in *Ford*, subjecting Mexico-based defendants to specific personal jurisdiction in this forum is neither "reasonable" nor "predictable." *Ford*, 141 S. Ct. at 1030. Plaintiffs do not plead any facts showing that defendants "enjoy[] the benefits and protection of [New York] laws." *Id.* at 1029. Nor do plaintiffs allege that defendants seek "the enforcement of contracts" or the "defense of property" in New York because there is no pleading of any contract to enforce or property to defend. *Id.*[4]

Plaintiffs try to skirt corporate form by imputing the trades of New York-based non-defendant affiliates to Mexico-based defendants and, relatedly, conflating those non-defendants' sales desks with Mexico-based defendants. (*See* Dkt. 229 at 8) (wrongly claiming that "each Defendant maintained the sales desk through which Plaintiffs purchased the bonds at issue in New York"). This misleading attempt to attribute separate entities' in-forum activities to defendants is foreclosed by the SAC's own contradictions and lack of non-conclusory agency allegations. (*See* Dkt. 206 at 4-6.) Plaintiffs resort to arguing that *Ford* somehow endorsed a complete disregard of corporate formalities in the personal jurisdiction context. (*See* Dkt. 229 at 8.) But nothing in *Ford* disturbed well-settled Second Circuit law, which holds that to find

[3] Contrary to plaintiffs' suggestion, this Court did not find that defendants traded directly with any plaintiffs or credit allegations that defendants "engaged in 'United States MGB over-the-counter trading.'" (*See* Dkt. 229 at 6.) Instead, as it made clear later in its opinion, this Court accepted those allegations as true only for the sake of argument and in the process of rejecting plaintiffs' arguments. *See MGB II*, 2020 WL 7046837, at *3 ("Even if Defendants established contacts with the forum by marketing and selling MGBs in the United States via the non-party affiliates' trade desks and broker dealers, as Plaintiffs claim . . ." (emphasis added)).

[4] Plaintiffs incorrectly assert that the relevant forum contacts for determining personal jurisdiction in this case are with "the United States as a whole." (Dkt. 229 at 5 n.4.) As discussed in defendants' motion-to-dismiss briefing, the relevant forum here is New York, not the United States more generally, because plaintiffs have failed to allege venue under the Clayton Act and cannot rely on Fed. R. Civ. P. 4(k)(2). (*See* Dkt. 178 at 24-25 & n.34.) In any event, plaintiffs do not dispute that the alleged New York contacts effectively cover all alleged United States contacts.

purposeful availment over an "indirect seller defendant" that allegedly sells artificially priced instruments "through non-party broker-dealer subsidiaries or affiliates," a plaintiff must plausibly allege "that an agency relationship [existed] between [the defendant] and [the non-party broker dealer]." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 84-85 (2d Cir. 2018); *see also, e.g.*, *Dennis v. JPMorgan Chase & Co.*, 439 F. Supp. 3d 256, 262 (S.D.N.Y. 2020) (same). Critically, unlike here, Ford conceded that it directly engaged in substantial business activities in Montana and Minnesota. The Supreme Court was thus not asked to consider (let alone determine) the nature of the relationship between Ford and the independent retail dealers. *See Ex parte TitleMax of Ga., Inc.*, No. 1200128, 2021 WL 2024678, at *8 n.2 (Ala. May 21, 2021) ("The present case is distinguishable from *Ford Motor* because *Ford Motor* did not involve the issue of agency." (emphasis added)).

III. Defendants' Alleged In-Forum Contacts Are Too Tangential to Confer Jurisdiction

Once baseless claims of "billions of dollars in [MGB] commerce" are properly disregarded, plaintiffs are left with an assortment of attenuated and conclusory allegations that fail to establish the requisite substantial connection between plaintiffs' claims and defendants' suit-related activities. *Knight*, 2021 WL 1226870, at *10. In *Knight*, a retaliatory action under the Federal False Claims Act where "the vast majority of retaliatory acts . . . occurred abroad," Judge Engelmayer held—after acknowledging *Ford*—that one in-forum retaliatory act was "too scant to make out a 'substantial connection with' New York." *Id.* This reasoning applies with even greater force here because, unlike in *Knight*, all alleged misconduct "occurred in Mexico alone." *MGB II*, 2020 WL 7046837, at *3.

And all of defendants' alleged New York contacts are "too tangential" to the claims actually at issue in the case. *Knight*, 2021 WL 1226870, at *10. Plaintiffs contend that

defendants shared "trade ideas" with sales desks in New York, moved "MGB inventory and cash" to and from New York, quoted prices, and collected proceeds from U.S. trades. (*See* Dkt. 229 at 6-7.) New York courts, however, have long held that merely "communicat[ing] with a party in New York or sending of monies into New York" absent the purposeful conduct of business in New York does not establish personal jurisdiction. *Hau Yin To v. HSBC Holdings PLC*, No. 15-CV-3590 (LTS) (SN), 2017 WL 816136, at *6 (S.D.N.Y. Mar. 1, 2017), *aff'd*, 700 F. App'x 66 (2d Cir. 2017). The "nature and quality and the circumstances" of the contacts alleged here reflects, at most, only "an 'attenuated' affiliation with the forum"—falling well short of establishing a substantial connection between defendants, the forum, and the alleged misconduct. *Knight*, 2021 WL 1226870, at *10 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 n.18 (1985)).

This Court recently reached a similar conclusion in *In re Lifetrade Litigation*, No. 17-CV-2987 (JPO), 2021 WL 1178087 (S.D.N.Y. Mar. 29, 2021). Although the case was decided under New York's long-arm statute and did not rely on *Ford*, the analysis this Court applied—"determining the nature of the connection [using] a fact-specific inquiry, and [assessing] the point at which [a] connection 'crosses the line [to] substantially related'"—is the analysis a post-*Ford* court would apply in the due process context. *Id.* at *3. And, just like the defendant's alleged use of New York banks in *Lifetrade* that amounted to "services performed overseas and largely in the background," allegations here regarding price-quoting, collecting proceeds, and bond distributions are "too tenuous to support the exercise of specific jurisdiction." *Id.* at *3-4 (citation omitted); *see also Knight*, 2021 WL 1226870, at *10. *Ford* has not relieved plaintiffs of

their burden to establish the requisite "substantial connection" between the litigation and the forum—a task that naturally becomes an uphill battle when no causal relationship is present.[5]

Plaintiffs' allegations related to marketing—the one type of conduct apart from actual sales that *Ford* emphasized—are also too tangential and conclusory to support specific jurisdiction here. *Cf. Ford*, 141 S. Ct. at 1028 (calling it a "[s]mall wonder" that Ford conceded purposeful availment, given that Ford marketed the very products at issue to Montanans and Minnesotans through "every means imaginable"). To begin with, plaintiffs have alleged that the "[e]mployees on the New York sales desks"—which were all employed and housed by non-defendant U.S. affiliates, and not defendants[6]—"were primarily responsible for marketing MGBs to investors in the United States." (Dkt. 201 at 4.) Plaintiffs allege that these New York sales desks "managed customer relationships, made sales calls, distributed trade ideas to U.S. investors, and arranged MGB trades." (*Id.*) Once again, the activities of non-defendant affiliates cannot create a substantial connection between defendants and the forum, and plaintiffs' conclusory agency allegations do not change this. *See Herlihy v. Sandals Resorts Int'l, Ltd.*, 795 F. App'x 27, 30 (2d Cir. 2019) (finding no substantial connection between plaintiffs' claims and defendants' alleged marketing contacts because defendant was not primarily responsible for the marketing or advertising of its resorts in the relevant forum).

The SAC's main allegation concerning defendants' "marketing" activities to U.S. customers is that "traders were often tasked with discussing events in the MGB market directly

[5] The connection between Ford's "veritable truckload" of in-forum contacts and the litigation was "close enough" to confer jurisdiction even without a causal relationship because Ford extensively promoted and sold and marketed in the forum states the very products that allegedly malfunctioned. *Ford*, 141 S. Ct. at 1031-32. For the reasons explained here, plaintiffs fail to plausibly allege that defendants sold price-fixed MGBs in or otherwise had substantial contacts with New York.

[6] *See* Dkt. 206 at 5 n.6 (citing SAC ¶¶ 138, 156, 176, 202, 216, 239, 261, and 280).

(cont'd)

with significant customers in the United States."[7] (SAC ¶ 72.) This allegation is entirely "[d]evoid of particulars . . . [and] must be set aside." *Knight*, 2021 WL 1226870, at *9 (disregarding conclusory allegations that one plaintiff "was subjected to harassment, bullying, and discriminatory treatment . . . in New York"); *see also Contant v. Bank of Am. Corp.*, 385 F. Supp. 3d 284, 290 (S.D.N.Y. 2019) ("allegations or evidence of activity constituting the basis of jurisdiction must be non-conclusory and fact-specific"); *Gerstle v. Nat'l Credit Adjusters, LLC*, 76 F. Supp. 3d 503,510 (S.D.N.Y. 2015) (rejecting allegations as conclusory where plaintiffs used "the same boilerplate description for the actions of [all defendants]").

Even accepting this allegation as true and not conclusory, simply "discussing events in the MGB market" with U.S. customers does not even approach the types of marketing allegations that the Supreme Court credited in *Ford* as evidence of purposeful availment. *See Ford*, 141 S. Ct. at 1028. As the Court explained, Ford directly "urges Montanans and Minnesotans to buy its vehicles" using, among other things, "billboards, TV and radio spots, print ads, and direct mail." *Id.* It was the nature and extent of Ford's marketing activities in the relevant states, combined with significant sales, that made Ford's potential liability in Minnesota and Montana "reasonable" and "predictable." *Id.* at 1030; *see also id.* at 1028 n.4 ("[w]e have long treated isolated or sporadic [contacts] differently from continuous ones").[8] Attempting to close the wide gap between the allegations here and the detailed facts presented in *Ford*,

[7] The charts purporting to depict each defendant's "MGB Marketing Process" similarly describe defendants' marketing activities to U.S. customers simply as "discuss[ing] MGB market with significant U.S. customers." (SAC ¶¶ 112, 136, 158, 178, 200, 218, 237, 259, and 278.)

[8] A party that does not execute in-forum trades—or control its affiliates with respect to in-forum trades—and merely "discusses" a certain instrument with in-forum customers cannot be said to be "deliberately 'reach[ing] out beyond' its home" by, for example, "'exploi[ting] a market' in the forum State or entering a contractual relationship centered there." *Ford*, 141 S. Ct. at 1025 (alteration in original) (citation omitted); *see also Hau Yin To*, 2017 WL 816136, at *6 ("Marketing, even if directed at New York residents . . . is insufficient to establish a transaction of business . . . unless it is supplemented by business transactions occurring in the state").

plaintiffs suggest that Ford did not market directly to Montanans and Minnesotans. (*See* Dkt. 229 at 9 n.7.) Not so. Ford admitted that it "designs and directs the substance of advertising for Ford vehicles in nationally based television, print, and online media," and, in some circumstances, "send[s] direct mail to consumers," including Montanans and Minnesotans. (*See* J. App'x at 73.) No such allegations—let alone admissions—exist here.

IV. Plaintiffs Are Not Entitled to Jurisdictional Discovery

Plaintiffs renew their unsuccessful request to cure the SAC's pleading deficiencies through jurisdictional discovery, purporting to seek "further facts showing that each Defendant deliberately served the U.S. market for MGBs," including "the specific volume of MGBs that each Defendant distributed into the United States during the Class Period." (*See* Dkt. 229 at 6 n.6.) This request should be denied because it is, as before, supported by nothing more than "speculations [and] hopes . . . that further connections to [the forum] will come to light in discovery." *Eternal Asia Supply Chain Mgmt. (USA) Corp. v. Chen*, No. 12 Civ. 6390 (JPO), 2013 WL 1775440, at *10 (S.D.N.Y. Apr. 25, 2013) (second alteration in original) (dismissing without allowing jurisdictional discovery). Defendants' sworn declarations show that they did not "deliberately serve[] the U.S. market" in any form. *See Herlihy*, 795 F. App'x at 30 (affirming denial of jurisdictional discovery where "numerous unrebutted factual assertions" in defendant's affidavits showed that discovery was unwarranted). And "the specific volume of MGBs that each defendant distributed into the United States" is irrelevant for jurisdictional purposes because those purported acts are too tangential to create a substantial connection between New York and this litigation, which, again, focuses on the alleged misconduct of a handful of individual traders in Mexico. Plaintiffs' purported quest for a "specific volume" is also unwarranted where, as noted above, they fail to adequately allege a single direct trade in an

allegedly manipulated MGB with any defendant. There is thus "no way in which additional discovery would cure the jurisdictional defects at issue." *MGB II*, 2020 WL 7046837, at *5.[9]

CONCLUSION

For the foregoing reasons, plaintiffs' motion for reconsideration should be denied.[10]

[9] Further counseling against jurisdictional discovery is the fact that plaintiffs have already received substantial cooperation materials from settling defendants. (*See* Dkt. 206, at 19-20); *see also, e.g.*, *In re Aluminum Warehousing Antitrust Litig.*, 90 F. Supp. 3d 219, 239 (S.D.N.Y. 2015) (denying jurisdictional discovery where plaintiffs knew findings of government investigation and already "had discovery from [some] alleged conspirators").

[10] If the Court were to grant the motion for reconsideration, plaintiffs' claims should still be dismissed for the reasons stated in Moving Defendants' Joint Motion to Dismiss for Failure to State a Claim. (*See* Dkt. Nos. 185, 207.)

Dated: June 10, 2021

Respectfully submitted,

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